

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
FEB 20 2004

IN RE ENRON CORPORATION SECURITIES,
DERIVATIVE & "ERISA" LITIGATION

MDL Docket No. 1 Michael N. Milby, Clerk

This Document Relates To:

MARK NEWBY, et al., Individually and
On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ENRON CORP., et al.,

Defendants.

Consolidated Civil Action
Case No.: H-01-CV-3624
(Jury)

This Document Relates To:

PAMELA M. TITTLE, et al., Individually and
On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ENRON CORP., et al.,

Defendants.

Consolidated Civil Action
Case No.: H-01-CV-3913

**DEFENDANT VINSON & ELKINS L.L.P.'S MEMORANDUM CONCERNING
DISCOVERY OF EXAMINER TRANSCRIPTS**

Vinson & Elkins L.L.P. ("V&E") hereby opposes the discovery of transcripts of sworn interviews given by V&E lawyers to the Examiner. Although the only discovery expressly sought at this time is against certain financial institutions (the "Financial Institutions")

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for the transcripts of their employees, several parties¹ have advanced arguments which, if accepted, could be extended to reach transcripts of V&E witnesses. Because we oppose such discovery, we raise our objections now.

FACTUAL BACKGROUND

In February 2002, the Official Committee of Unsecured Creditors of Enron Corp. (the “Creditors’ Committee”) served V&E, Arthur Andersen LLP, and McKinsey & Company with subpoenas issued under Bankruptcy Rule 2004. Subsequently, Lead Plaintiff in *Newby v. Enron Corp., et al.*, H-01-CV-3624 (S.D. Tex.) (Harmon, J.), filed a motion in the Bankruptcy Court to obtain access to the documents that had been produced to the Creditors’ Committee pursuant to the Rule 2004 subpoenas. Judge Gonzalez denied Lead Plaintiff’s request, concluding that Lead Plaintiff was improperly attempting to use the fruits of the Rule 2004 process to further its litigation efforts in the *Newby* civil action. *In re Enron Corp.*, 281 B.R. 836, 844 (Bankr. S.D.N.Y. 2002) (attached as Ex. A). Judge Gonzalez explained that courts have denied use of Rule 2004 materials to further litigation pending outside the bankruptcy court. *Id.* at 841.

Also in 2002, as part of his investigation of certain of Enron’s special purpose entity (“SPE”) transactions, Neal Batson, the Enron Corp. Examiner (the “Examiner”), sought information, including documents and sworn statements, from various persons and entities, including V&E and its lawyers. A number of entities objected to the Examiner’s investigative efforts, asserting that the information sought was privileged, confidential, or otherwise subject to

¹ The parties include Lead Plaintiff, the Outside Directors, Kenneth L. Lay, and Certain Private Action Plaintiffs (collectively, the “Moving Parties”).

protection from public disclosure.² To address these confidentiality concerns and secure the cooperation of witnesses, the Bankruptcy Court issued a series of orders designed to protect the integrity of the examination process by ensuring that the information provided would be used only for purposes related to the bankruptcy.³ These confidentiality orders, along with the Bankruptcy Court's 8/15/02 order denying Lead Plaintiff's request to obtain 2004 material, were available on the Bankruptcy Court's website.

V&E relied on the confidentiality orders to assure the confidential treatment of information it provided to the Examiner. To further ensure that information provided in investigative interviews conducted by the Examiner would not be misused, V&E entered into a stipulation with the Examiner governing the conditions under which these sworn interviews of V&E attorneys would be given.⁴ The stipulation provided that the interviews of V&E witnesses and the resulting transcripts would be subject to the Bankruptcy Court's orders governing the production and use of confidential material.⁵ The stipulation also limited attendance at the interviews to counsel for the Examiner, counsel for the Creditors' Committee, a representative of the debtor, counsel for V&E, counsel for the witness, and a stenographer, each of whom had first

² See Outside Directors' Memorandum Concerning Discovery of Examiner Transcripts ("OD Mem.") Ex. F (Motion of Neal Batson, the Enron Corp. Examiner, With Respect to Certain Procedural Issues in Connection With Termination of the Enron Corp. Examination, dated Nov. 4, 2003) ¶ 8.

³ Specifically, the court issued a number of orders governing the use and production of confidential material among the Examiner, the Creditors' Committee, the debtor, and non-parties. The court also issued orders governing the sharing of Rule 2004 materials that set forth the conditions under which third parties could obtain Rule 2004 material, including limiting such access to use in the bankruptcy proceedings.

⁴ See Stipulation between Alston & Bird LLP, on behalf of the Examiner, and the Interviewee, through Williams & Connolly LLP, counsel to the Interviewee and V&E (attached as Ex. B).

⁵ *Id.* ¶ 7.

agreed to be bound by the confidentiality obligations it imposed.⁶ V&E and its current and former lawyers then voluntarily cooperated and provided sworn interviews to the Examiner. The Examiner conducted the interviews in a manner that was not bound by the rules of evidence or procedure ordinarily applicable to depositions. The resulting transcripts therefore reflect many questions that would never have been asked or answered in litigation.

Upon the conclusion of the Examiner's investigation, Lead Plaintiff sought discovery in *Newby* of copies of the Examiner transcripts from the Financial Institutions. In response, the Financial Institutions requested a protective order from the Bankruptcy Court.⁷ Lead Plaintiff opposed the order, raising the same fundamental arguments now presented to this Court – fairness and efficiency. Judge Gonzalez dismissed Lead Plaintiff's fairness argument with a series of rhetorical questions:

Judge Gonzalez: Does the creditors' committee in Enron have all the information that your clients have? I don't understand this theory about all plaintiffs in all actions should have the same information. Am I understanding that the Newby plaintiffs are willing to share all their information with the committee and Enron?

Counsel for Lead Plaintiff: I think all parties should have access to the same information.

Judge Gonzalez: That is an interesting issue. The Newby plaintiffs have access, and you certainly can serve subpoenas on, if you haven't done so already, the financial institutions that have the same parties. You can argue that they should be compelled to testify and ask them the same questions. So you do have access in that regard.⁸

⁶ *Id.* ¶ 1. Apparently, the Outside Directors entered into a separate confidentiality agreement with the Examiner governing their sworn statements. *See* OD Mem. at 11 n.12.

⁷ *See* Opposition of Financial Institutions to Lead Plaintiff's Motion to Compel ("Fin. Inst. Opp.") at 2.

⁸ OD Mem. Ex. B at 27-28 (Dec. 4, 2003 Transcript, *In re Enron Corp., et al.*, Case No. 01-16034 (Bankr. S.D.N.Y.)) (the "Protective Order Tr.").

Judge Gonzalez also pointed out the distinction between documents provided to the Examiner and the transcripts of the Examiner's sworn interviews.

You still can go to Judge Harmon with respect to a document marked as "confidential" and argue whether it should be turned over, but these [Examiner transcripts] were not in existence at the time. These documents were created as a result of the examiner's pursuit under confidentiality orders. If you weren't allowed to be present under these agreements, why then do you think that you would be allowed to get the document that was created as a result of the deposition transcript itself?⁹

Finally, Judge Gonzalez considered Lead Plaintiff's efficiency argument and found it outweighed by concerns for the integrity of the examiner process, the witnesses' reliance on his confidentiality orders, and the ability of future courts and examiners to secure the cooperation of witnesses.

I think the arguments by the Newby plaintiffs in some respect are correct, but I understand points they are making in terms of efficiency and costs. I certainly think it would be more efficient, from the plaintiffs' standpoint in the Newby actions, to have access to this information, as well as access to many things, and it would probably be less costly from their standpoint. But I do think that the issues and the concerns raised by the financial institutions with respect to the general integrity of the process of the examination and the reliance upon confidentiality orders, et cetera, and the assurance that future examiners will be able to enter into these orders with the counterparties' having the confidence that they will be enforced and will be enforced by the Court that enters them, as is provided for under the order, that overall that lack of efficiency that would be attendant in granting this motion coupled with the additional costs I think is just something that is going to be borne in these circumstances because I do think it is more important to protect the integrity of these confidentiality orders . . .¹⁰

Accordingly, on December 8, 2003, Judge Gonzalez entered a protective order (the "Protective Order") shielding "all transcripts of depositions, sworn private statements or other interviews provided to the Examiner . . . from disclosure in the consolidated private

⁹ *Id.* at 25-26 (emphasis added).

¹⁰ *Id.* at 39-41 (emphasis added).

securities litigation known as *Newby v. Enron Corp., et al.*, H-01-CV-3624 (S.D. Tex.) (Harmon, J.).”¹¹ No appeal was taken from the Bankruptcy Court ruling.

Similarly, less than two weeks ago, Judge Gilmore quashed a subpoena issued under Rule 17(c), Fed. R. Crim. Pro., seeking access to the Examiner’s materials, including transcripts. Judge Gilmore pointed out that the Examiner’s materials “were only in his possession as a result of his court-appointed fiduciary role and the protective order that was issued to assist him in gathering those documents” and should not be produced.¹²

ARGUMENT

The parties now seeking discovery of the Examiner transcripts in the Consolidated Cases before this Court are admittedly seeking to overturn Judge Gonzalez’s December 8, 2003 order.¹³ The various arguments advanced for overturning that order are deeply flawed. But even if there were some merit to these arguments, they should not now be entertained as the current situation was clearly anticipated when the original confidentiality orders and agreements were entered. Litigants should not be permitted to sit by while the testimony is taken and, once it is complete, seek to upset the settled expectations of the witnesses.

¹¹ See OD Mem. Ex. A (Order Granting Motion for Protective Order, entered Dec. 8, 2003, by Honorable Arthur J. Gonzalez in *In re Enron Corp., et al.*, Case No. 01-16034 (AJG) (Gonzalez, J.)). Outside Directors point out that the Protective Order does not prohibit Enron or the Creditors’ Committee from using the Examiner transcripts in their respective cases or prohibit discovery of the transcripts in the *Tittle* litigation. OD Mem. at 5. Of course, these issues were not before Judge Gonzalez, and it is premature to judge how he would decide them.

¹² See Feb. 9, 2004 Transcript, *U.S. v. Howard, et al.*, Criminal No. 03-93 (S.D. Tex.) (“Krautz Tr.”), at 38 (attached as Ex. C).

¹³ See OD Mem. at 9 (Judge Gonzalez’s order “cannot be the final word on whether the Examiner materials should be disclosed”) (emphasis in original).

I. Allowing Discovery of the Examiner Transcripts Would Upset Expectations on Which Witnesses Relied and Thereby Damage the Integrity of the Examination Process.

As Judge Gonzalez and this Court have both recognized, Rule 2004 allows for far reaching investigations – much broader than permitted in civil discovery. For example, in its Order granting the Outside Directors’ motion for an order prohibiting the Creditors’ Committee from taking Rule 2004 discovery from them, this Court observed that a Rule 2004 subpoena would allow “far reaching discovery . . . without the procedural safeguards of the discovery rules of the Federal Rules of Civil Procedure.”¹⁴ Similarly, Judge Gonzalez has noted that “Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions.”¹⁵

In order for bankruptcy examinations to proceed effectively, “[examiners] and the subjects of [the] investigation[s] must be unhampered by the threat that any information which comes into the Examiner’s hands will be fair game for a plethora of anxious litigants, regardless of the limitations on disclosure which the Bankruptcy Court has imposed.” *In re Baldwin United Corp.*, 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985) (emphasis added). To this end, courts curtail discovery of examination materials, especially where producing parties have relied on promises of confidentiality. *See Air Line Pilots Assoc.*, 156 B.R. at 435 (prohibiting disclosure of examination materials where producing parties had relied on a protective orders); *In re Apex Oil*

¹⁴ *See* Order on Outside Directors’ Motion for Protection From Bankruptcy Rule 2004 Subpoenas, dated Dec. 12, 2002, by the Honorable Melinda Harmon in *Newby v. Enron Corporation, et al.*, Civil Action No. 01-CV-3624 (S.D. Tex.) (Harmon, J.) (attached as Ex. D).

¹⁵ *See In re Enron Corp.*, 281 B.R. at 840; *see also Air Line Pilots Assoc., Int’l v. Am. Nat’l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 432 (S.D.N.Y. 1993), *aff’d*, 17 F.3d 600 (2d Cir. 1994).

Co., 101 B.R. 92, 103-04 (Bankr. E.D. Mo. 1989) (“[Movant] may not ask this Court to unravel an agreement designed to facilitate the Examiner’s timely completion of his report . . .”).¹⁶

In granting the Financial Institutions’ motion for protective order, Judge Gonzalez emphasized the importance of protecting the parties’ ability to rely on confidentiality orders. *See* Protective Order Tr. at 40-41. If settled expectations of confidentiality are set aside in subsequent litigation or transparently undermined by allowing discovery from those who cooperate with the Examiner (as opposed to discovery from the Examiner), future examination witnesses will realize that these promises of confidentiality are meaningless and offer no incentive for voluntary cooperation. *See In re Baldwin United Corp.*, 46 B.R. at 316 (production

¹⁶ The Outside Directors argue that if the possible use of Rule 2004 testimony in collateral litigation is not a sufficient reason to deny an examination, then it cannot be that examinations may not be used in collateral civil proceedings. OD Mem. at 15. Judge Gonzalez, however, cited case law to the contrary – *i.e.*, barring Rule 2004 discovery for this very reason. *See In re Enron*, 281 B.R. at 841-42. In any event, the Outside Directors’ argument puts the cart before the horse – even if a future possibility of discovery were not sufficient to require a bankruptcy court to shut down an examiner’s inquiry, that would not demonstrate that such discovery should be had after an inquiry proceeds under protective orders. Apart from the clear flaw in the Outside Directors’ logic, none of the cases they cite actually hold that examiner materials are discoverable in collateral litigation. *See e.g., In re Lufkin*, 255 B.R. 204, 208-09 (Bankr. E.D. Tenn. 2000) (“examinations should not be designed to discover information for use in an unrelated case or proceeding.”). Similarly, the Certain Private Action Plaintiffs’ reliance on *In re Continental Airlines*, 150 B.R. 334, 342 (D. Del. 1993), is misplaced. *See* Certain Private Action Plaintiffs’ Corrected Joinder at 1. There the court rejected sealing of a fee reviewer’s report that had been filed with the Bankruptcy court. In contrast, here the transcripts have not been filed with the court, hence the presumption of public access does not attach, and the reasoning of *In re Continental Airlines* does not apply. *See Air Line Pilots Assoc.*, 156 B.R. at 433 (no common law or constitutional right of access to discovery materials); *see also In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (no common law right of access to information collected through discovery); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (no First Amendment right to pretrial discovery).

of “investigative materials obtained through promises of confidentiality and reliance upon this Court’s orders raises grave concerns”); *In re Apex Oil Co.*, 101 B.R. at 104 (same).¹⁷

The Outside Directors attempt to sidestep Judge Gonzalez’s reasoning by recasting the issue as involving only a confidentiality agreement between the witnesses and a non-party (*i.e.*, the Examiner). *See* OD Mem. at 11. But this approach ignores the fact that Judge Gonzalez entered a series of orders designed to protect the integrity of the examination process from efforts to misuse it for civil discovery and to protect the ability of examiners to obtain voluntary cooperation from witnesses through entry into confidentiality agreements.¹⁸ And Judge Gonzalez squarely held that granting Lead Plaintiff access to the transcripts of Examiner interviews would be inconsistent with – and undermine the purposes of – his prior orders.¹⁹

¹⁷ Lay’s assertion that the Creditors’ Committee has indicated its willingness to disclose the transcripts misses the point. *See* Defendant Kenneth L. Lay’s Memorandum Concerning Discovery of Examiner Transcripts (“Lay Mem.”) at 8 n.5. The prejudice resulting from disclosure accrues to the witnesses and future bankruptcy examinations, not to the Creditors’ Committee.

¹⁸ In this regard, the Outside Directors’ analogy to trade secrets “where parties have agreed, by contract, to protect from disclosure technical or financial data” is also unpersuasive. *See* OD Mem. at 12. First, the transcripts were created subject to confidentiality orders and agreements implemented under the Bankruptcy Court’s Rule 2004 process, not merely a commercial agreement between two parties. Second, trade secrets are primary information, as opposed to the Examiner transcripts which, as secondary material, were only created as a result of the examiner process. Unlike trade secrets, which absent discovery would remain unknown, the parties can obtain access to the same information provided to the Examiner through deposition discovery.

¹⁹ The Financial Institutions made clear in their motion before Judge Gonzalez that the sworn interviews at issue were given voluntarily pursuant to agreements with the Examiner protecting their confidentiality. Protective Order Tr. at 11. Judge Gonzalez nevertheless concluded that allowing discovery of the transcripts would violate the Bankruptcy Court’s confidentiality orders. *See id.* at 40-41 (“... I do think it is more important to protect ... the confidentiality orders ... to give the parties that are involved ... the confidence that these orders will be interpreted and complied with ...”).

II. The Moving Parties Fail To Offer Any Compelling Reason To Allow Discovery.

The Moving Parties offer a variety of justifications for seeking discovery of the Examiner transcripts – none of which alone or even when viewed collectively suffices to overcome the strong public policy underlying Judge Gonzalez’s orders.

A. Witness “Unavailability”

The Outside Directors claim that discovery of all of the transcripts is necessary because the evidence they contain cannot be replicated, pointing to witnesses who will presumably not testify due to possible criminal prosecution. OD Mem. at 6. Out of the 200+ witnesses who gave testimony or interviews to the Examiner, the Outside Directors point to only one who is indicted. *Id.* Even assuming that a half dozen more fall into that category, it remains less than 4% of the 200+ witnesses. It would be anomalous to cast aside the protections governing the entire examination process because a tiny portion of witnesses who may decline to testify.

The Outside Directors also make the surprising claim that the “natural fading of recollections” supports their unavailability argument. *Id.* The Examiner’s sworn interviews and depositions were taken primarily in 2003 (in the third quarter of 2003 for V&E witnesses), and depositions discovery will begin in June 2004. There is no basis to assume that the memories of 200+ witnesses will fade to the point of “unavailability” in a year or even two. Indeed, if that assumption were accepted, the “unavailability” exceptions would swallow all of Federal Rule of Evidence 804.

Thus, even if there were some legal principle that “unavailability” of a witness trumps the integrity of the examination process and the reasonable expectations of those who

participated in it on the assurance of confidentiality (and there is not), the rule would not justify wholesale disclosure of the transcripts.

B. Procedural Fairness

The Moving Parties claim that, because Enron and the Creditors' Committee have access to the transcripts, "procedural fairness" requires that the transcripts be provided to all parties in *Newby* and *Tittle*.²⁰ See OD Mem. at 9; Lay Mem. at 6. First, this should come as no surprise: it is the precise situation contemplated by the Bankruptcy Court orders and agreements to which Judge Gonzalez referred when entering his order protecting the Examiner transcripts from discovery in *Newby*. Second, as noted above, Judge Gonzalez rightly expressed skepticism about the principle that fairness dictates that all parties must have the same information when he pointedly asked Lead Plaintiff: "Does the creditors' committee in Enron have all the information that your clients have? I don't understand this theory about all plaintiffs in all actions should have the same information. Am I understanding that the Newby plaintiffs are willing to share all their information with the committee and Enron?" See Protective Order Tr. at 27. Judge Gonzalez's comments were right on the mark, as evidenced by the decision the Outside Directors and Lay cite,²¹ *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (witness statements, created by an attorney in anticipation of litigation, were not subject to discovery).²²

²⁰ The Outside Directors also claim that if all parties are not allowed access to the transcripts, "[f]ragmentary rulings and splintered access to evidence will severely impair this Court's effort to manage this case." OD Mem. at 11 (emphasis added). This assertion is nowhere explained or supported.

²¹ See OD Mem. at 9; Lay Mem. at 6.

²² The work product doctrine announced in *Hickman* was later codified in Federal Rule of Civil Procedure 26(b)(3). The Outside Directors' citations to Federal Rule of Civil Procedure 26(b)(3) and *Hendrick v. Avis Rent A Car System, Inc.*, 916 F. Supp. 256, 259 (W.D.N.Y. 1996), are of no

The Outside Directors further argued they should have access to the Examiner transcripts because the transcripts will be produced to defendants in parallel criminal proceedings, citing the subpoena under Rule 17(c), Fed. R. Crim. Pro., issued by Michael Krautz. *See* OD Mem. at 11. But then Judge Gilmore quashed the subpoena, citing the protective orders issued by Judge Gonzalez governing access to the Examiner's Rule 2004 examination materials. *See* Krautz Tr. at 37.

The Moving Parties also assert that because Enron and the Creditors' Committee are using the transcripts in connection with their respective suits, "it is difficult to conceive of an order denying the defendants in those cases full access to them as well." OD Mem. at 3 n.4. When and how Enron or the Creditors' Committee may use the transcripts has yet to be decided. Certainly, it would be antithetical to the nature of the Bankruptcy Court's examination process sought to be protected by Judge Gonzalez's various orders for the transcripts to be disclosed wholesale. At this point, it is premature to allow discovery of all transcripts on the speculation that some of the transcripts may be disclosed in the future.

C. Ability To Impeach Witnesses and Offer Admissions Against Opponents

The Outside Directors also complain about their inability to use the Examiner transcripts to impeach witnesses and to offer admissions against party opponents. *See* OD Mem. at 3. As Judge Gonzalez acknowledged in granting the Financial Institutions' protective order, it would undoubtedly be of assistance to the civil litigants to have access to the Examiner's investigative interviews. But Judge Gonzalez determined that the potential for harm to the

moment, however. *See* OD Mem. at 2, 10. Federal Rule 26(b)(3) simply entitles a party to discover his or her own prior statement. Here, witnesses presumably have access to their own statements – what the Moving Parties seek are the statements of all the other witnesses who gave testimony to the Examiner. Rule 26(b)(3) offers no support for this.

examination process outweighed these interests of private litigants. As Judge Gonzalez pointed out, the parties will have the opportunity through discovery conducted in the Consolidated Cases to obtain documentary and testimonial evidence. *See* Protective Order Tr. at 28 (“You can argue that they should be compelled to testify and ask them the same questions. So you do have access in that regard.”).

D. Efficiency

A recurring but wholly unsupported claim in the Moving Parties’ briefs is that discovery of the Examiner transcripts will somehow streamline the discovery process. Lead Plaintiff’s Motion to Compel (“Lead Pl. Mot.”) at 1; OD Mem. at 13. It is unrealistic to suggest that production of the transcripts will significantly reduce the number of depositions taken in this case. Available transcripts, not to mention several days of transcripts for some witnesses, are as likely to lengthen examinations (with witnesses being quizzed on what they said earlier) as they are to shorten them. The parties have already submitted a proposed protocol. There is no agreement to reduce the deposition time of witnesses whose Examiner transcripts are made available.

III. Availability of Transcripts from Third Parties

In opposing discovery sought from the Examiner, his lawyers have made the point that many of the documents are available from third parties. Of course, it is true that the underlying documents can be subpoenaed directly from the witnesses simply by reissuing the same subpoenas. Some of the Moving Parties have suggested that the Examiner believes that civil litigants should also be permitted to obtain transcripts of the Examiner’s investigative interviews from the witnesses. In light of the Bankruptcy Court’s December 8, 2003 ruling protecting the Examiner transcripts in the hands of the witnesses, we doubt that the Examiner’s

statements were intended to ignore Judge Gonzalez's view to the contrary. More fundamentally, even if the Examiner decides that he has no interest in protecting his investigative materials now that his own work is done, that is irrelevant: we focus here, as Judge Gonzalez did, on the integrity of the examination process and the reasonable expectations of the witnesses.

IV. This Court Should Defer to Judge Gonzalez's December 8, 2003 Order.

The Examiner conducted his investigation pursuant to the orders of the Bankruptcy Court, including orders designed to prevent the misuse of the Rule 2004 process for civil litigation purposes and to encourage voluntary cooperation of witnesses through assurances of confidentiality. The Moving Parties' arguments for discovery of the Examiner transcripts were presented to Judge Gonzalez in connection with the Financial Institutions' motion for protective order. Judge Gonzalez considered the interests of fairness and efficiency in civil litigation but found those interests outweighed by the need to preserve the integrity of the bankruptcy examiner process. The Bankruptcy Court's conclusions concerning the reach of its own orders and the fate of investigative materials created pursuant to the Rule 2004 examination process deserve great weight.

The Outside Directors claim that they should be excused from presenting their objections to the Bankruptcy Court because they "were unable to appear" before Judge Gonzalez to oppose the December 8, 2003 Protective Order. OD Mem. at 7. The Outside Directors never explain why they were "unable" to appear. On the contrary, the Outside Directors have made

limited appearances on other occasions,²³ and they could have done so here. Indeed, the Bankruptcy Court is the only forum where all affected parties are present.

The issues raised by the Moving Parties' attempt to obtain discovery of the Examiner transcripts for use in the Consolidated Cases go to the very heart of the bankruptcy examination process. These issues are properly resolved in accordance with the Bankruptcy Court's December 8, 2003 order protecting the Examiner transcripts from discovery.

²³ See Outside Directors' Notice of Limited Appearance and Notice of Agreement With Respect to Committee 2004 Motion, dated Sept. 9, 2002, in *In re Enron Corp., et al.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y.) (Gonzalez, J.) (attached as Ex. E).

Conclusion

For the reasons set forth above, this Court should deny the Lead Plaintiff's Motion to Compel and defer to Judge Gonzalez's December 8, 2003 Protective Order.

Respectfully submitted,

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DATED: February 20, 2004

Counsel for Defendant VINSON & ELKINS L.L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record on this the 20th day of February, 2004, via posting to www.esl3624.com.

A handwritten signature in black ink, appearing to read "Brian McLachlan", written over a horizontal line.

Brian A. McLachlan

The Exhibit(s) May
Be Viewed in the
Office of the Clerk